EFFECT OF AN INCREASE IN THE LIVING WAGE BY A COURT OF INDUSTRIAL ARBITRATION UPON VESTED RIGHTS AND DUTIES UNDER PREËXISTING AWARDS

IN the present article I address myself to a subject which, so far as I am aware, has never yet received a comprehensive consideration by courts of industrial arbitration. The subject, brought into strong relief by recent fluctuations in the cost of living, has not, generally at any rate, been faced by legislatures. Sidetracked by industrial courts, it is yet vital to their efficient functioning. For the purpose of the present article, I may explain that under the legislation of the state of South Australia, the Industrial Court is precluded from awarding less than a living wage, that the lockout and the strike are punishable offenses, and that the court is authorized by statute to *vary* an existing award.

I will deal first, though briefly, with new cases. When an industrial court has raised the living wage, in the absence of such declaration being challenged (and the challenge being duly supported by evidence or argument), it may be assumed that the court will accept the living wage, and apply it in the new cases which come before it. It is necessary, further, to distinguish between the living wage and the minimum wage for an industry. The minimum wage may be a primary minimum (extending to unskilled laborers in an industry generally), or a secondary minimum (applicable in cases of skill, etc., in various grades of an industry). As regards the primary minimum, it will be apparent that, although the court may be at liberty to declare a wage higher than the living wage, there may be cogent reasons for the exercise of caution where the living wage has recently been raised materially. No argument is necessary to justify a loyal adherence to the living wage as a bed-rock level. It will simplify my later argument if I briefly resume the cogent reasons for maintaining, at any rate in new cases, preëxisting marginal differences between the living wage (or the primary minimum wage, if that be higher than the living wage) and the secondary minimums. The conditions of industrial organization to-day call for an increas-

ing degree of skilled work. It is absolutely necessary to the well-being of a community that the skilled and competent worker should be encouraged in every way possible. If he is not, a premium is put on apathy, and the community drifts towards that "cult of incompetence" which, according to many distinguished authorities, is one of the regrettable prices paid for democratic institutions. In part, the need for differential rates of wage may be illustrated by the need for maintaining a reasonably high standard of output. The question of output to-day is even more important than the question of nominal wages. Again, while employers should, as far as possible, coöperate in maintaining a high secondary wage, they are subject, in the absence of legal regulation, to the danger that if they are just to the competent and skilled workmen, they may find themselves handicapped by the competition of some other employer who is less scrupulous. It is scarcely possible to exaggerate the importance of this limitation upon any disposition which the employers may have to regard special competence or efficiency by adequate additions to a living or primary minimum wage. In the early days of industrial legislation, and when Wages Boards were first introduced, it was not so much the intention of the legislatures to secure an adequate remuneration for skill, etc., as to preclude sweating. Prevailing opinion assumed that the skilled worker could take of himself. In the course of time, however, it has become increasingly apparent that a system of industrial regulation must pass far beyond the question of the elimination of sweating if national efficiency is to be maintained, or justice to the workers even approximately assured.

I pass from new cases to consider what adjustments, if any, should be made with respect to court awards actually in force at the time when the living wage is increased. Naturally, when the living wage is increased, the employees who are under an obligation still in force will desire that the revised standard should be immediately applied to them as well as in new cases. Briefly, the argument is that what a court awards is not so much a particular sum of money as so much purchasing power. When, through an increase in the cost of living, the living wage is increased, the employees are entitled to argue that the revised standard should be universally and comprehensively adopted if the spirit of preëxisting regulation is to be honored, notwithstanding the fact that the award under which

they are working is still binding as a matter of strict law. On the other hand, the employers are entitled to argue that the award, having been made in contemplation of being binding for a certain period, should be honored as something more than a scrap of paper, — in a word, that no adjustments should be made until the pre-existing award has run its normal course.

I assume that, under any conceivable legislation, an industrial court will be formally authorized to vary its own awards. What, from the point of view of that public policy to which both civil and industrial courts defer, should be taken to be the scope of the power to vary? Is it limited to the rectification of obvious anomalies in existing awards, or is the power sufficiently wide to include the adaptation of those awards to new circumstances (including therein an increase in the cost of living as found by the court)? Such questions raise many difficulties. In the South Australian legislation various sections may be quoted as suggestive of a legislative intent that awards shall run their normal course. There is certainly no general statutory direction prescribing that preëxisting awards shall be altered automatically by reference to variations in the living wage. Such legislation has been suggested. If such legislation were enacted, and if it were accompanied by a direction to the court to declare the living wage from year to year, it would save a good deal of controversy and discontent. The appeal to employees is apparent. So far as employers are concerned, they would at any rate know exactly where they stood, and that, if they entered upon an obligation to perform contracts for future services, they would do so subject to the risks of a variation in the living wage. Confining myself to existing legislation, I am of the opinion that the South Australian court has the full legal power to adjust court awards for which a variation is asked. But, while the court has the legal power, it may not be subject to a coextensive legal duty.

The distinction between the power which a court may technically possess and a duty which it ought to recognize is vital. An industrial court *might* declare a living wage of £10 for a working week of twenty hours! But the things which an industrial court ought to do are much more modest, and involve a far more restricted ambit of investigation, than the things which it might technically do. With regard to the question to what extent the court should exercise the power which it may legally possess in the way of effecting ad-

justments of existing awards, it is my disagreeable duty to point out some difficulties. I may begin with a brief explanation of the nature of the "living wage" as understood by the South Australian court. In the first place, while the "living wage" is a very modest interpretation of the needs of the average family, it is not, for such a family, a wage below which subsistence is impossible. Australian industrial tribunals generally have recognized that, in a young, prosperous and progressive community like Australia, the living wage should be somewhat above a bare subsistence level. It is, apart from such very abnormal conditions as may result from war, a declaration of what, in the opinion of the court, is necessary in order that an average worker may be able at least to maintain the standard of living which generally prevails in Australia among unskilled workers. In the second place, when the court makes a declaration of the living wage which involves a substantial increase on a preëxisting standard, it ought to allow a margin of safety in view of the practical certainty of some rise in the general level of prices. The reasons for doing so should be apparent. I have indicated them at length in my remarks on the "Theory of the Pernicious Circle" in *The Carpenters and Joiners' Case*.[1] It follows that, for a period at any rate, the living wage as declared by the court is anticipatory, and to that extent may admit of some slight deduction when considering what is immediately necessary even for the maintenance of the Australian standard. (I must concede that the period is apt to be brief. This has been illustrated by a recent declaration of the living wage which I made last September. Judging from the latest figures of the Commonwealth statistician, the cost of living in this state has already advanced since my judgment to an extent equal to the margin of safety which I had in mind at the time the living wage was declared. Some people appeared to hold that my estimate, at the time it was made, was excessive; but I cannot think that they had had much experience of workingmen's budgets, or of the peculiar difficulties with which an industrial judge has to deal. I am aware that grounds exist for hoping that the general level of prices may shortly decline. I can only trust that the hope may be realized.) In the third place, as I have pointed out in *The Plumbers' Case*,[2] when I considered the question of wages in relation to the distribution of the national income, the judicial estimate even of the

[1] 1916–18, S. A. I. R. 170.

[2] 1916–18, S. A. I. R. 116.

living wage is necessarily affected by variations in national efficiency. The court is under a legal duty to award the living wage; but in the discharge of this duty, it is necessarily conditioned by some reference, however imperfect, to the very difficult but extremely important question of what at a given time the community can afford to pay, without suffering a catastrophic increase in the price of commodities out of which wages are ultimately paid. It will be apparent that a marked disturbance of the general level of prices, and consequent trade and industrial dislocations are greatly increased if, on the increase of the living wage with a view to future cases, the new standard is immediately applied to all existing awards.

The remarks just made with regard to the precise significance of the living wage, and the results of its revision, must be cumulatively considered. With regard to the danger of industrial dislocation, I do not feel that it is generally recognized amongst employees how grave might be the consequence if, apart from statutory direction, the court were to assume the responsibility of the view that, as far as it legally could, it should throw all existing awards into the melting pot. The efficient functioning of industry, so essential to the welfare of both employers and employees, is so dependent upon considerations of credit and finance, and upon the need for a reasonable certainty as to the future, that if employers are never able to know, or with reasonable foresight anticipate, whether a legally binding award is to be altered or not, trade and industry may be depressed, and initiative discouraged to the verge of extinction. I am quite aware that even at present employers manage to survive, and often thrive, despite the risk of supply and demand of labor operating unfavorably to them. Although employers may not pay less than the legally binding wage, they may be bound to pay more if labor is scarce. But this risk is not an adequate reason for imposing the additional risk of having legal obligations abruptly altered from time to time, not according to statutory direction, but according to the particular views and outlook of an industrial judge, as to what ought to be the living wage.

I doubt, moreover, whether employees who argue in favor of the immediate adjustments of all existing awards according to variations in the standard of the living wage quite realize that the argument cuts both ways. It is to be hoped that in the near future the cost

of living will decline. But if we accept the view that upon an increase in the living wage there should be an immediate and complete adjustment of all existing awards, then we ought also to accept the view that when an industrial court should be happily in the position of being able to lower the living wage owing to a decrease in the cost of living, then all awards properly before the court should be adjusted in accordance therewith, although such awards had not expired, and although the employees working under them would naturally feel that they were entitled to the schedule of rates during the normal continuance of the award.

One further matter seems not unworthy of consideration. There can only be one living wage for unskilled labor; and that is declared by courts from time to time with a view to assisting the court in new cases which may come before it. I fear that if, without statutory sanction, the court were to adopt the view that wholesale adjustments of existing legal rights and duties ought to be made, the result might be to exercise a depressing influence upon a judge who is called upon to revise the living wage. If the living wage and the secondary wage are limited to new cases, and to isolated existing awards, then the effect of a rise in the living wage on the cost of living is not so immediate or potent, and the obligation cast upon industry is an obligation which gradually takes substance as new cases come before the court, and as existing awards run their course.

I think I have said enough to show that while a court may have technically the power to make such adjustments as it deems proper with regard to awards properly before it, there are strong reasons why the powers should be exercised with considerable caution. I have tried to state these reasons at their full value. They must be read, however, in conjunction with the reasons expressed earlier, — why secondary minimums should be sufficiently high to stimulate the ambition and effort of the worker, and also in conjunction with the reasons, which should be obvious, why even the unskilled workers throughout the various branches of industry should be in receipt of at least a living wage. It is only thus that it is possible to arrive at sane conclusions. We cannot answer a reason by ignoring it: nor can we appreciate the importance of a reason without viewing it in relation to other reasons — *pro* and *con*. Comprehensively considered, the whole question which I am now considering must be admitted to be one of extraordinary delicacy and diffi-

culty. In order to determine under what, if any, circumstances the power of adjustment which a court may legally possess should be exercised, speaking very generally, regard should be paid to the date of the regulation before the court, the margin of discrepancies between the old and the new standard and the financial outlook and general conditions of the industry under consideration. To be more precise, it is necessary to distinguish between the living and the secondary wage. While reasons of national health and efficiency may be urged in favor of wholesale adjustments, the cogency of such reasons has a special claim to consideration where the living wage is involved.

On an application to vary an award, subject to any power which the court might have to dismiss the case or to order a conference of the parties, the living wage, unless challenged (together with argument or evidence in favor of such challenge) must be awarded. The duty of the South Australian court is never to award less than the living wage. (Special provision is made with respect to aged, slow, or infirm workers.) With regard, however, to the secondary wage, this being a matter of policy, and there being no legislative direction to the court, it appears to me that the presumption is unfavorable to adjustments, and that the burden of proving the existence of very special reasons for a complete adjustment (or, at least, of establishing a strong *prima facie* case) rests with the party seeking to reopen the award. Needless to say, the "special reasons" must outweigh, in the particular case, the general reasons which I have previously stated against the reopening of awards. The secondary wage, it must be noted, does not threaten the subsistence of the worker, at any rate to the extent to which that subsistence is threatened where an increase in the cost of living makes a pre-existing estimate of the living wage obsolete.

I have frequently referred to the possibility of a statutory direction authorizing complete adjustment of existing awards. I feel that I ought to point out, however, that such a direction would be unlikely of itself, and in the absence of increased production, to insure an enduring material benefit to the workers as a class. In a highly protective community, it would tend to inflate prices. Despite the existence of profiteering by some business concerns it remains unfortunately true that the extent to which profits may contribute to enhance wages is limited, if we take industry in the

bulk. No jugglery, not even a complete transformation of our industrial system in accordance with the ideals of state socialists or guild socialists, would enable a community to maintain higher real wages than are warranted by the prevailing conditions of financial prosperity. Under the present social system, the fact is apt to be lost sight of, owing to an exaggerated impression of the extent to which increased wages may be paid out of profits, instead of out of prices. According to English statistics, if the national income were equally divided among all, the result would only be 3/– a day at pre-war prices. Writing with reference to the lessons of the war, a contributor to *The Round Table* for December last remarks:[3]

"We have learnt that the true wealth of a nation consists in a healthy, strong population, and in the utilisation of its material resources to that end. But unfortunately—as we shall find—we have discovered no new Aladdin's lamp, no new short new cut to prosperity. Wages and profits depend as of yore on hard work, saving, efficient management, co-operation between Capital and Labour, and up-to-date plant. There is no inexhaustible fund of riches into which the State can dip its hand, and which it can distribute gratis to its citizens. Our wealth is what we produce and what we save. If we have wasted capital in war, we shall have to make it good. If our production is impeded and saving gives way to extravagance, profits and enterprise will decline and wages and employment with them. We must not be misled by the fallacious appearances of war. We have been enjoying the temporary prosperity of a spendthrift, speeding towards bankruptcy. We have been living easy, because we have been living on our capital."

In illustration of the fallacious appearance of prosperity during the war, the same writer relates that in Russia peasants now weigh instead of counting their paper money; that in revolutionary France, Mirabeau's paper-money policy was pursued until a pair of boots cost £100 in the depreciated currency, and that the consequence of thinking only of the distribution of wealth, as distinct from production, is seen at the present moment in Russia, where the great proportion of factories is likely before long to be closed, and the town populations, at any rate, to be without the necessities of life.

If a statutory direction authorizing a complete automatic adjustment of existing awards according to variations in the cost of

[3] "The Financial and Economic Future," 33 THE ROUND TABLE, December, 1918.

living is to be materially helpful, several things are necessary: (1) A clear apprehension, on the part of both employers and employed, of the ideal in view. That ideal includes nothing less than the stability of industry, and the economic security of the worker — security of employment, security of earning power of wages, and security in respect of those general conditions of work which safeguard the worker's health and comfort. (2) A clear apprehension on the part of both employers and employed of the means conducive to the realization of the ideal just indicated. Superficially, those means involve progressive production; but a material increase in production will be found on analysis to demand a wholehearted coöperation, in my opinion, some form of real partnership between employers and employed. Only thus can the pernicious doctrine of "go-slow" be eliminated. Apropos, the term "go-slow" is by custom reserved as a monopoly of the employed. But when I compare the methods of industrial organization in Australia even with those in force in America, or in Germany before the war, I cannot resist the conclusion that so far as concerns Australia, there is considerable room for improvement in most industries, both as regards the work done by employees, and also as regards the methods of business organization and management by employers. Employers cannot have it both ways; they cannot argue that brain as much as muscle is the source of wealth, and at the same time deny the possibilities of very materially increasing production by means of better methods of business management and organization.

If the views just expressed were taken to heart by the employers and employed, a statutory direction authorizing automatic adjustments of existing awards in accordance with new standards could be given effect to without any catastrophic increase in prices, or any perilous dislocation of trade and industry. Under conditions of mutual recrimination and conflict between employers and employed, even the purposes of wise legislation are frustrated, the possibilities of judicious action by industrial courts are nullified or hampered at every turn, and that future social justice which is the inspiration of progressive thinkers is postponed to some remote and imaginable future. If the real good now within our grasp is missed, even though the motive should be the attainment of something imaginably better, then that something imaginably better will have been made the enemy of an actual and immediately attainable good. For the

present conditions, neither employers nor employed can escape censure. While many employers desire to do the fair thing, most employers suffer from the obsession of profits, and the weight of the dead hand of a traditional industrial organization. On the other hand, while many employees would prefer the substance to the shadow, and are willing to work for other ideals by evolutionary process, the great majority of employees in Australia are under the leadership of those who mean well, but have very vague conceptions of exactly what they want, and still vaguer conceptions of the processes involved in the realization, in a complex community, of what they want. If this state of things continues, employers and employed alike will suffer. An industrial court may punish in various ways employees who strike; but even industrial courts cannot maintain a high standard of work. Nor can they, save possibly by a painful and long-drawn-out struggle, bring enlightenment or a sense of justice to employees as a class. The present struggle is educative, but expensive. Incidentally, it thwarts the desire which an industrial court may have to insure progressive and all-round adjustments of the rates of wage according to variations in the cost of living.

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